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No. 40.

IN THE

SUPREME COURT

OF THE

UNITED STATES

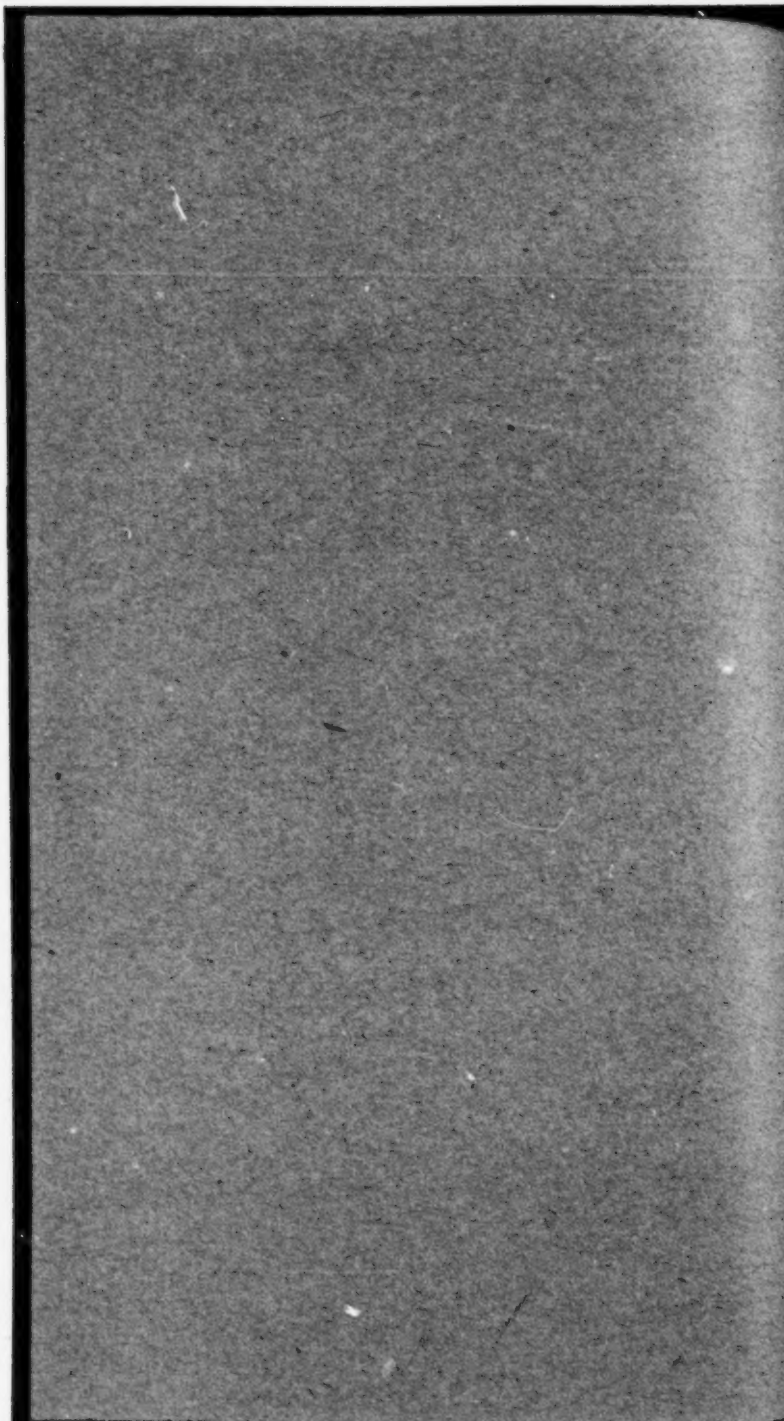
OCTOBER TERM, 1902.

MARIANO F. SENA,
Appellee,
vs.
THE UNITED STATES ET AL.,
Appellee.

On appeal from the Court of Private Land Claims.

PETITION FOR REHEARING.

L. BRADFORD PRINCE,
By His Solicitor,
JAMES W. BROWN.



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To the Honorable the Supreme Court of the United States:

Your petitioner, L. Bradford Prince, one of the defendants herein, hereby most respectfully petitions this Honorable Court that this case may be reheard for the following reasons:

This court decided in the above case, at this term and on April 6, that "the petition should be dismissed for laches," and based such decision on "the evidence of abandonment and laches of the claimant."

But your petitioner expects to demonstrate to the court, as the grounds for rehearing, that there was no abandonment of the land granted, and no lawful evidence of such act; and that laches can not be imputed to the claimant for any action or neglect of his, either before or after the cession of the territory to the United States, because at no time was there a title or lawful possession adverse to that of the claimant:

First—The defendants by their answers did not plead the alleged abandonment or laches of the petitioner; and they, or either of them, could not in verity have pleaded such abandonment and laches without alleging title and possession in the United States; but such title and possession were not only not pleaded, but were not sustained by proof on the hearing.

Second—The petitioner could not be charged with laches subsequent to the cession of the territory to the United States, unless his grant was imperfect, and for that reason subject to the two years' limitation for filing a petition in confirmation, as was prescribed by the statute creating the Court of Private Land Claims.

I.

The defendants by their answer did not plead the alleged abandonment or laches of the petitioner, and they, or either of them, could not, in verity, have pleaded such abandonment and laches without alleging title and possession in the United States; but such title and possession were not only not pleaded, but were not sustained by proof on the hearing.

Section seven of the statute creating the Court of Private Land Claims enacts "that all proceedings subsequent to the filing of the said petition shall be conducted, as near as may be, according to the practice of the courts of equity of the United States;" so that, if the defendants wished to claim the benefit of the defense of the statute of limitations created by the act, or of the limitations presumed by a court of equity under the purely equitable defense of laches, they must have pleaded the same by demurrer, answer or plea, or such defenses must be held to have been waived.

The defendant, the United States, pleaded the statutory limitation of two years; but this court did not dismiss the petition on that ground, but on the ground of equitable laches.

The defendants did not plead the abandonment or the laches of the petitioner, which, had they intended to claim the benefit of such objections, must have been pleaded. The petitioner was entitled to such pleas by every rule of equity pleading, so that he might know what case he had to meet. Because no such pleas were pleaded by the defendants, no lawful testimony was adduced to sustain issues which had not

been framed. The imputation of the abandonment of the grant and the laches of the grant claimant are first met with in the brief filed with this court, a few days before the hearing, by the counsel for the United States. And, if passing reference is herein made to this brief, the apology of counsel therefor must be that, in default of pleading and proof embodied in the record, it is the only source of information on the subject of the alleged abandonment of the grant and the laches of the claimant, of both of which the petitioner would seem to have been found guilty without having been charged therewith by the pleadings, or convicted thereof by the proofs.

It is settled law that, if the defendant would avail himself of a plea of laches, such plea must be based upon a long, peaceable and adverse possession of the property in controversy. Of objections of this character Judge Story, in his work on Equity Pleading, section 813, says:

> "This is a peculiar defense in equity in cases which are not within the reach of the statute of limitations. Courts of equity have established the doctrine that, after a great lapse of time, and a long, peaceable possession, they ought not to interfere to grant relief, for the policy of the law is to give quiet and repose to titles, and courts of justice ought not to countenance laches or long delays on the part of claimants. Indeed, after a great lapse of time, courts of equity will raise a presumption of some legal or equitable extinguishment of the adverse title, if

> the circumstances of the case will enable them to supply it."

There is, however, a class of cases in which courts of equity will apply the doctrine of laches though it be not pleaded or the bill demurred to, and it is thus distinguished by this court in Willard vs. Ward, 164 U. S., 502-504, when it is said:

> "But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though laches are not pleaded or the bill demurred to."

An examination of the decided cases under this exception will show that the complainant pleaded title and not possession, and that the defendant pleaded and proved a peaceable, long-continued possession of the property in dispute, and that it was alone because of such possession in the defendant that the courts would take into consideration facts going to show laches proved by the record, though laches was not pleaded.

This doctrine can not be extended to this case. The defendant, the United States, pleaded neither title nor possession, and there is nothing in the record to prove either. The defendants, The American Turquoise Company and J. P. McNulty, pleaded title and possession under the United States, but the record shows that such possession was acquired against law and was void. The defendants' case is not within the

exception, and they should be held to have waived the laches of the petitioner, if any there was.

In view of the neglect of the attorney of the United States to plead abandonment and laches before the Court of Private Land Claims, the counsel who prepared the brief filed with this court readily perceived that, if these objections were to be utilized, even if raised only by assertion and surmise embodied in a brief, they must be based on the title and adverse possession of the United States obtaining at the date of the cession of the territory, for this court had decided that

> "The terms of a treaty are to be applied to a state of things then existing in the ceded territory."
>
> Strother vs. Lucas, 12 Pet., 438.

And that,

> "The United States seem never to have claimed any part of what could be shown by legal evidence and local law to have been severed from the royal domain before their right attached."
>
> United States vs. Arredondo, 6 Pet., 717.

Therefore the counsel in his brief asserted that this grant had been abandoned by the legal representatives of the original grantee prior to the cession of the territory, and that thus the land had reverted to the Mexican government, and had passed to the United States by the treaty of cession.

Counsel defines abandonment under the Spanish law, quoting from the *Partidas* (Brief, 54):

> "If a man be dissatisfied with his immovable estate and abandon it, immediately he departs from it corporally, with an intention that it shall be no longer his, it will become the property of he who first enters therein."

It will be noted that, under this general law, the land did not revert to the government, but became "*the property of he who first enters therein.*" It could only have reverted to the government after an inquest of office (Gonzales vs. Ross, 120 U. S., 625; United States vs. Arredondo, 6 Pet., 691-747). In the latter case the court held that when the government resumed and regranted lands abandoned by the Indians, who held their title alone by occupancy, some procedure in denouncement and forfeiture was necessary. If this was the law in the case of abandonment of a title by occupancy, *a fortiori* must it have been the law in the case of a perfect title to land donated by the king. And it appears from the law of 1682 (2 White's Recop., 52) and the royal regulations of 1754 (Reynold's Comp., 50), that the royal lands, occupied without title, could not be resumed by the king without some judicial proceeding in forfeiture.

If the United States had pleaded that this grant to Leyva had been abandoned under the law of the *Partidas*, it must, to have sustained its plea, have proved that the former government had denounced and forfeited the land, and that thus the title had reverted to it—and of this there is no proof in the record—or that the grant had been abandoned, and

that it had become the property of the person who had first entered into possession of it. In this latter event, it would have been incumbent upon the United States to have pleaded a disclaimer of any title in itself; and thus the abandonment of the claimant would have become immaterial to the government, and an objection which it could not have pleaded, and from which it could have derived no advantage. The question of title would then have been between the legal representative of Leyva and the person claiming under the alleged abandonment, a question not cognizable by the Court of Private Land Claims.

But counsel has another objection which, also, is not based upon the pleadings and proofs. He says (Brief, 57):

> "Abandonment is largely a question of intent. The facts disclosed by this record show abandonment, *at least*, about the time of the foregoing law (1837)."

The law of 1837 is thus given on page 57 of the defendants' brief. By it the departmental assembly of New Mexico decreed:

First—Every individual who abandons the land upon which he has settled and which he acquired by grant, with the intention of establishing himself elsewhere to live there, and does not leave some one to take his place in ordinary labor, shall lose the real property he had acquired.

Second—The acting justice of the peace will immediately give notice to the government of those residents who go to live elsewhere, *that it may be granted to another.*

If the government had pleaded the abandonment of the grant by Juan Angel Leyva under this law, to sustain its plea it must have proved each and every particular enacted by the first section of the law, which, under it, constituted abandonment; and, farther, under the second section, the report of the justice of the peace to the government and the regrant of the land to another by the departmental assembly, which action would have constituted the inquest of office that would have proved the forfeiture of the land (United States vs. Arredondo, 6 Pet., 747). In the absence of the minutes of the departmental assembly which now form a part of the archives in the custody of the Surveyor General, and which would have shown the forfeiture of this grant if it had occurred, and in the absence of all other proof of the fact, the court can not presume an abandonment under this law. And if abandonment under this law had been pleaded by the United States and proved, the land would not have reverted to the Mexican government, but would have been granted to another by the departmental assembly, and hence could not have passed to the United States by the treaty of cession; and this fact would again have necessarily led to a disclaimer of title by the United States.

The law of abandonment formed a part of the general law of Spain and Mexico. It was not affected or changed by the colonization law of 1824 or the regulations of 1828; nor were these nor the general law of Mexico with respect to the ownership and disposition of the public domain altered by the "Bases of 1835," the "Constitution of 1836," or the "Bases of 1843."

Whitney vs. United States, 167 U. S., 529.

Title seven of the "Bases of 1843" (Reynolds', 243) defines the powers of departmental assemblies, and the provisions among others contain the following:

> "To decree what is useful and conformable respecting the acquisition, alienation and exchange of property that may belong to the community and department; with regard to the alienation of lands the existing laws shall prevail."

The law of July 20, 1837, had reference alone to the abandonment of lands within community grants or those belonging to the department, the only lands over which the departmental assembly of New Mexico had control (Sandoval vs. United States, 167 U. S., 278), and the regranting of such lands to another; and could have had no application to the perfect grant to Jose de Leyva, made by the king of Spain in 1728, which was beyond the power of both the departmental assembly and the government of Mexico.

Abandonment was not pleaded, and the record contains absolutely no testimony that this grant was abandoned by its owner. Such abandonment can not be presumed; it was a question of fact, and the burden of proving it was upon the party alleging it (Clark vs. Hammerle, 36 Mo., 639). Nor can the petitioner be deprived of his property, either under the civil or common law, by mere allegation or surmise

Ferris vs. Coover, 10 Cal., 589-615.

But this court in its opinion say:

> "As there is no testimony tending to show that the Leyvas ever sought to resume

possession of the land after the death of Juan Angel in 1839, there was at least a presumption of abandonment."

There could have been no testimony of that character if the grant had been abandoned by Juan Angel, because it would then have passed under the law of the *Partidas* out of the possession of the heirs by another entering upon it; or, under the law of 1837, it would have been re-granted to another; or by judicial proceedings, in the nature of an inquest of office, it would have reverted to the government, and in neither event could the heirs have resumed possession. But, before basing a presumption on the mere fact of non-occupancy of the grant, the government must have proved the abandonment of it. Negative testimony alone as to the former does not warrant a presumption as to the latter, for abandonment is a matter of law and fact, and not of presumption.

The all-sufficient reason why the Leyvas did not "resume possession" of their grant was that they had never lost it. Juan Angel Leyva was in possession when he was killed on his grant protecting his property from the attacks of hostile Indians, and even the attorney of the United States does not presume to allege in his brief that such death was *per se* an abandonment of the property. He left surviving one son and sole heir, Salvador, the grantor of the petitioner (R., 14), who on his father's death became by inheritance the owner of the grant, the widow taking no interest. (2 White's Recop., 99.) The law deemed him to be in legal seizen and possession of the land. (United States vs. Arredondo, 6 Pet., 715.) He was at that time a minor (R., 13), and under the Spanish

and Mexican law abandonment could not have been predicated of a minor, nor, for the same reason, the legal incapacity of a minor, could prescription run against him. While the title was in the minor, Salvador, the possession, care and control of the land was, under the civil law, in his tutor or guardian.

Therefore, Salvador could not, under the law of the *Partidas* have been "dissatisfied with his legal estate and abandon it," nor could he "depart from it corporally with an intention that it shall be no longer his;" nor, under the law of 1837, could he legally have abandoned "the land upon which he had settled and which he acquired by grant, with the intention of establishing himself elsewhere to live there."

Collins vs. Innis, 10 Martin, 287.
Miers vs. Bethany, 9 La., 379.
Orso vs. Orso, 11 La., 62.
Escriche; title, "Menor."
1 Domat's Civil Law, 517.

The Spanish law of abandonment ceased to be in force in New Mexico when the Kearney Code was promulgated September 22, 1846, or when the territory was ceded to the United States in 1848. It is immaterial when, Salvador Leyva, the owner of the grant, was at the latter date a minor.

II.

The petitioner could not be charged with laches subsequent to the cession of the territory to the United States unless his grant was imperfect, and for that reason subject to the two years' limitation for filing a petition in confirmation, as was prescribed by the statute creating the Court of Private Land Claims.

The court say in its opinion:

> "If this be considered an imperfect grant, the right to file it expired years ago; if it be a perfect grant, as now claimed, we see no reason why the owner may not prosecute his claim in the territorial court. Without expressing an opinion whether this was a perfect or an imperfect grant within the meaning of the law, * * * the petition should be dismissed on the ground of laches."

But did not the court deside, by implication at least, that this was a perfect grant, when it dismissed the petition on the ground of laches, and not because it was not filed within the statutory limitation of two years? And did not the court, when it admitted title and possession in Jose de Leyva and his descendants from 1728 to 1839, decide that such possession, under the laws of Spain and Mexico, must have been under a title that was complete and perfect?

The decision of this question is of the highest importance to the petitioner; in fact, it is the only question in this case. If the petition was not dis-

missed because of the statutory limitation, the grant must be held to have been perfect; and, having been a perfect grant at the date of the cession in 1848 to the United States, there could have been no possession by the United States at that time or subsequently, and, therefore, the government could not impute laches to the grant claimant.

This court has decided that "the terms of a treaty are to be applied to the state of things then existing in the ceded territory." (Strother vs. Lucas, 12 Pet., 438.) "In the treaty of cession no exceptions were made, and this court has declared that none can thereafter be made. (8 Pet., 463.) The United States must remain content with that which contented them at the transfer, when they assumed the precise position of the king of Spain." (Strother vs. Lucas, 12 Pet., 446.) "The United States seem never to have claimed any part of what could be shown by legal evidence and local law to have been severed from the royal domain before their right attached." (United States vs. Arredondo, 6 Pet., 717.) "A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king ceded only that which belonged to him. Lands he had previously granted were not his to cede." (United States vs. Percheman, 7 Pet., 88.) These principles, declared by this court under the treaty with Spain, equally apply to the treaty with Mexico.

Upon these principles the Supreme Court decided that, as the authorities of Spain were authorized to grant the public domain in accordance with their own ideas of the merits and considerations presented by the grantee, two questions only could arise in the courts of the United States, viz., whether in fact a

grant had been made, and its legal effect when made. (United States vs. Arredondo, 6 Pet., 717.)

To these two questions this court has in this case added a third, whether a perfect grant can be forfeited for laches imputed to the owner after the date of the cession of the territory, at the instance of the succeeding government, which had never acquired title to or possession of the land granted by the former government.

In this case the court has decided that a perfect grant of land may thus be forfeited, and the laches which may be imputed to the grant claimant are thus stated in the opinion:

> "Failure to assert such title within a reasonable time thereafter (i. e., "after the establishment of a title as of a certain date," that here referred to being "the death of Juan Angel in 1839") opens the case to the defense of laches."

To this your petitioner begs leave to reply that the assertion or non-assertion of this title by the infant heir of Juan Angel, or his tutor, prior to the cession of the territory in 1848, could have been of no import to the United States, a foreign sovereignty; the title, as it then existed, was what was protected by the treaty of cession. So, too, if the grant owner could, after the treaty, have asserted his title in the territorial courts, the United States, having no interest in the land, could not have been a party defendant to the action, and it could in no way have concerned the government. If to obtain a confirmation or rec-

ognition of his perfect title it was necessary for the claimant to bring suit against the United States, such suit could not have been brought until authorized by the government. The territory was ceded in 1848, the tribunal was created in 1891. This almost criminal neglect by the government of its treaty obligations can not be imputed to the petitioner as laches, nor can these facts open the case to a defense of laches by the United States, which had neither title to nor possession of the land in controversy.

Again, the court say:

> "In 1854, six years after the treaty, a surveyor general was appointed for New Mexico, whose duty it was to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico, and report to Congress, with a view of confirming *bona fide* grants, and giving full effect to the treaty. No action appears to have been taken before him to ascertain the validity or boundaries of this grant, although the act seems to have remained in force until 1891, when the Court of Private Land Claims was created. The public land surveys were extended over this tract in 1861; homestead and other entries were made, improvements established, patents secured, mines opened and developed, but no attempt to assert the rights of the grantee or his descendants."

To this statement your petitioner begs leave to reply that—

First—It was the duty of the surveyor general, and not of the grantee, to ascertain the origin, nature, character and extent of this grant, and to report thereon to Congress for its final action. His neglect of duty for thirty-seven years can not be imputed as laches to the petitioner.

Second—That under the said act of 1854 the lands covered by this grant were reserved from sale or other disposal by the government until the final action of Congress thereon; and that, therefore, every homestead, mining or other entry made under the government on this land prior to March 3, 1891, when the statute was repealed, was absolutely void, and the actions of the government in this respect in violation of its own laws, and the actions of mere trespassers upon his grant can not be imputed to the petitioner as laches.

First—This grant was donated in 1728. An examination of the papers of grant (R. 112) will show that juridical possession of the land was given May 25, and from the caption of the *protocol* it will appear that it was deposited in the archives of New Mexico May 29, 1728. These papers formed the *protocol* and record of the grant. This recordation was a public act, carrying on its face faith and credit that would make full proof in the tribunals of Spain, hence in those of the United States. (Farmer's Heirs vs. Eslava, 11 Ala., 1028-1041.) These papers were still deposited as a record in the archives of New Mexico when, in 1848, the territory was ceded to the United States.

The surveyor general of New Mexico, in his annual report to the Secretary of the Interior dated September 30, 1856, which was in that year laid before Congress, annexes to it two schedules, the first being

> *"Schedule of documents relating to grants of land by the Spanish and Mexican government forming the archives of the surveyor general of New Mexico."*

This schedule enumerates 1,014 items, and No. 240, index number 441, is: "1728, Leiba, Jose de—Grant."

Schedule No. 2 is entitled

> *"Abstract of grants to land selected from the public records of the Territory, found in the archives at Santa Fe, New Mexico."*

And of this schedule, No. 87, of a total of 197, is: "May 25, 1728, Leiba, Jose de, Santa Fe County, Juan Domingo de Bustamente, Governor." (Cong. Doc., 1856, 231, 245.)

So that it is a fact that the government, from its own archives and records, had knowledge, and every citizen notice, of the grant in 1856, and both were bound by it. This grant was not, in 1893,

> "found and brought to public notice for the first time in perhaps a century,"

as the attorney of the United States, imputing his own inexcusable ignorance as a public officer to others, says on page 47 of his brief.

The statute of 1854 made it the duty of the surveyor general

> "to ascertain the origin, nature, character and extent of *all* claims to lands under the laws, usages and customs of Spain and Mexico."

He was empowered for that purpose to issue notices, summon witnesses, administer oaths, and perform all other acts in the premises.

Although this grant was No. 87 of the total of 197 grant claims reported to Congress by the surveyor general in 1856, by schedule No. 2, he took no action to fulfil his duty to examine and report to Congress upon this grant for thirty-seven years, from 1848 to 1891, when the statute of 1854 was repealed. This glaring and unexcused default of the government in the fulfilment of its treaty obligations, can not be imputed to the petitioner as laches because he did not "assert" his title *during the time it was pending undisposed of before the survyor general under the statute of 1854.*

> "It is a well-established principle that, when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain the right by the misconduct or neglect of a public officer, the law will protect him."
>
> Lytle vs. Arkansas, 9 How., 314-332.

If the petitioner had "asserted" his title by voluntarily filing his petition for confirmation with the Sur-

veyor General, such action would have added nothing to its validity, nor would it have been notice of his title of equal import to the record of it in the archives of the United States; in fact, it would not have been notice of any nature. If the Surveyor General had found and reported the grant to be perfect, it would in no wise have strengthened it. If Congress had confirmed it, that action, also, would have added nothing to the title, for the grant had been perfect since 1728. The grantee's title would still have been that donated by the king of Spain, and the best evidence and notice of the grant would have been the original archive record of it.

Paige vs. Scheibel, 11 Mo., 167, 184.

Second—The eighth section of the statute of 1854 provides:

> "He (the Surveyor General) shall make a *full report on all claims* as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo of 1848 * * * which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants and give full effect to the treaty between the United States and Mexico; *and until the final action on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government.*"

It can not be questioned that this grant, which had remained as a record in the archives of Spain, Mexico and the United States since 1728, was

one of the *claims* which the Surveyor General was to examine and report to Congress for its action. He had knowledge of it, and had reported to Congress that it was amongst the archives of Spanish grants in his official custody. The statute made it the duty of the Surveyor General to examine and report on this grant, and did not make it the duty of the claimant to file a petition in confirmation (Paige vs. Scheibel, 11 Mo., 184). His title was perfect, and the filing of his *protocol* in 1728 was the grant (Whitney vs. United States, 167 U. S., 529), and the record of the grant. This record was a public record, and it estopped the king of Spain from again granting the land, as also the Republics of Mexico and the United States, his successors.

United States vs. Arredondo, 6 Pet., 737.
Fletcher vs. Peck, 6 Cranch, 87.

If, then, this was such a claim, the land embraced by it, the boundaries of which were stated in the act of juridical possession, and which at that time, in 1856, could have been readily ascertained and determined by the Surveyor General, and thus the land granted distinguished from the public domain, the only possible object in the case of a perfect grant (Botiller vs. Dominguez, 130 U. S., 245) was, under the act of 1854, reserved from sale or other disposal by the government.

This question of reservation has been decided by this court. In Stoddard vs. Chambers, 2 How., 317, a claim was located on land within a Spanish grant claim, which had been filed and recorded under the statute, but not recommended to Congress for confirmation. By the act of 1811 (2 Stat., 617), until the

decision of Congress was had, the land covered by a Spanish claim could not be offered for sale, and the court held that the location, and the patent founded on it, were absolutely void.

Eaton vs. Salisbury, 21 How., 431.

Doolan vs. Carr, 125 U. S., 634.

Lake Superior Co. vs. Cunningham, 155 U. S., 373.

In the matter of Baca Location No. 3 (30 L. D., 102) the Secretary of the Interior, in construing this statute, says:

> "It mattered not whether the claim was a valid one. If the lands were covered by a Spanish or Mexican *claim* they were to be reserved for the very purpose of affording an opportunity of investigating and determining the validity or invalidity of the claim. This investigation was to be made in the first instance by the Surveyor General, but the action of that officer was not final. His report was to be submitted to Congress, and there the means of final action were to be provided. To fully meet the purpose of the reservation it was necessary that it should at once become operative whenever and wherever lands were covered by a claim such as the statute describes."

It appears from the answer filed by the defendants, the American Turquoise Company and J. P. McNulty (Rec. 5), that they claimed title from the United States under the mining laws,

> "and that they and their grantees have enjoyed the exclusive, undisturbed and quiet possession of the same for more than ten years last past."

This answer was filed January 16, 1900, so that the alleged title to the lands attempted to be granted by the United States had its inception on or prior to January 16, 1890, at which time the statute of 1854 was in force, and therefore such lands were reserved from sale or other disposal by the United States, and such alleged titles were absolutely void.

The court further say:

> "The Court of Private Land Claims was established in 1891. * * * It was not until 1899 that the petition in this case was filed by a person who appears, in 1895, to have found lineal descendants of the original grantee, from whom he had secured deeds of abandoned grant, the very existence of which seems to have been forgotten."

To this statement your petitioner begs leave to reply that, the statute creating the Court of Private Land Claims made it obligatory upon claimants under imperfect grants to file their petitons for confirmations within two years, or the claim would be barred; but a person claiming under a Spanish grant that was complete and perfect at the time when the United States acquired sovereignty

> "shall have the right (but shall not be bound) to apply to said court," etc.,

without any limitation as to time. So that the petitioner could to-day file his petition if he saw fit to do so, and a defendant, who could neither plead nor prove a title to or lawful possession of the land, could not impute to him his alleged delay as laches.

Aside from the fact that congress could not confer upon this court of equity, jurisdiction to determine the title to a perfect grant of land, and that the claimant could not do so by any action of his, the six years' delay of the petitioner in filing his petition for confirmation would not subject him to the charge of laches.

In Galliher vs. Caldwell, 145 U. S., 368-372, the court, in speaking of the adjudicated cases of this character, say that they

> "proceed on the assumption that the party to whom laches is imputed had knowledge of his rights, and an ample opportunity to establish them in the proper form; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in the condition or relation during this period of delay, it would be an injustice to the latter to permit him to now assert his title."

The court, in its opinion, say that the owner of this grant, Salvador Leyva, who had been in legal possession of it since the death of his father, in 1839, had no knowledge of "this abandoned grant, the very existence of which seems to have been forgotten." If

this statement be true, the first element of the above doctrine is wanting. But in making this statement the court evidently placed confidence in the verity of the assertions of the counsel for the United States made in his brief, as the court had the right to do in any statement of fact in a pending suit made to it by an officer of the court. But in this instance the confidence was misplaced. Your petitioner has already proven that his grant was not, and could not have been, abandoned, and when counsel for the United States asserted that this grant was, in 1893, "found and brought to public notice for the first time in perhaps a century," he must have known that the truth was that the *protocol* of this grant of 1728, the will of Simonde Leyva, of 1785, devising the grant to his son, and the deed of 1833, by that son, conveying the grant to Juan Angel Leyva, which latter the counsel produced in evidence at the hearing before this court, were subsisting public archives in the custody of the surveyor general of New Mexico, which had been transmitted by Spain and Mexico to the United States on the cession of the territory, and that the surveyor general had reported such grant to congress in 1856, as being among the said archives; and, further, that it was in evidence in the record that Salvador, the son of Juan Angel Leyva, knew of this grant, which he called "*Pueblото de los Leiba*," and his ownership of it. (R., 14.)

In this case it can not be even pretended that the grant owner has had, since the cession of the territory in 1848, an ample opportunity to establish his rights as against the United States, if that were needful, in a proper forum established by the government.

But the most important element of the above doctrine is that the petitioners' delay caused such a "change in condition or relation" respecting the subject matter of litigation "during this period of delay," that "it would be an injustice to the latter to permit him to assert his title."

The circumstances contemplated by this doctrine do not prevail in this case. The defendants had notice of this title from the date of the cession of the territory to the United States. In 1893 they had notice of the purchase of this grant by the petitioner. In 1896 an action in ejectment, later discontinued, was brought by the petitioner in the territorial courts against the defendants, the American Turquoise Company and John P. McNulty, so that they had at no time cause to believe that the rights of the grant were worthless or had been abandoned. At that time, and at all times, these defendants had a mere possessory right to "about one hundred acres of land" (R., 5) within this grant of some sixteen thousand acres, which, imputing to them a knowledge of the law, they knew to be absolutely void. Yet these defendants persisted in their trespasses upon the petitioners' land, and continued to operate his mines thereon, so that any "change in condition or relation" which happened "during this period of delay" was caused by the unlawful acts of the defendants which have occasioned damage to the petitioner and not to them—the capital and assets of the company being the turquoise "conveyed" from the mines of the petitioner—and, therefore, such delay in "asserting" his title "during this period of delay" can not be imputed to the petitioner as laches. For the defendants in this case "there is," as Falstaff says, "no equity stirring."

From the facts of the petitioner's title, above stated, under which the law deems him and his grantors to have been in legal seizen and possession of this grant of land since 1728 (United States vs. Arredondo, 6 Pet., 715); and from the failure of the defendants to plead or prove title to or possession of this land, the alleged neglect of the petitioner to "assert" his title within a reasonable time, in the manner suggested by the court, does not open this case of a perfect grant title to the objection of laches by the United States or its grantees; and, if it did so, the record does not show that abandonment or laches were pleaded, or that the grant was abandoned, or that laches could in any wise be imputed to the petitioner.

If, then, the facts of this case, and the law applicable to them, as above set forth, be true, your petitioner respectfully prays that this case may be reheard.

And your petitioner further prays that the mandate in this case to the Court of Private Land Claims be withheld until the decision by this Honorable Court in the matter of this his petition.

Your petitioner further begs leave to suggest, if at this time it be meet and proper, that, in any event, the decree of this court should be modified to conform to the decision of the court herein. This decree affirmed the decree of the court below, which was "that the title to the tract of land alleged to have been granted by the king of Spain by Governor and Captain General Juan Domingo de Bustamente, on the twenty-fifth day of May, A. D. 1728, is of no validity and is not entitled to confirmation by this court." (R., 240.) This decree is not in conformity to the de-

cision of the Court of Private Land Claims, which was that the claim became imperfect and was "barred by this statute of limitations (of two years), and hence must dismiss the case for want of jurisdiction under the statute." (R., 241.) The decision of this court is that this grant claim "is one which the Court of Private Land Claims could not be called upon to confirm, and that, if for no other reason, the petition should be dismissed on the ground of laches," and the decree below is in no wise in conformity to it. By neither court was it decided that the grant was "of no validity," and, therefore, "not entitled to confirmation" by the Court of Private Land Claims.

And your petitioner will ever pray, etc.

L. BRADFORD PRINCE,
By his Solicitor, JAMES W. VROOM.

We certify that the foregoing petition is, in our opinion, well founded, and is not interposed for the purpose of delay.

JAMES W. VROOM,
Of Counsel.

ROBERT T. McNEAL,
Of Counsel.